IN THE HIGH COURTOF SOUTH AFRICA (NORTH GAUTENG, PRETORIA)

CASE NO: 2006/12

DATE:15/05/2013

In the matter between:

XK-V Applicant

and

MSV Respondent

JUDGMENT

MAKGOKA, J:

[1] The applicant seeks, on an urgent basis, a variation of an order of this court made on 22 June 2012. The application is opposed by the respondent. The parties are involved in an acrimonious divorce pending in this court. On 22 June 2012 a rule 43 application brought by the respondent came before court. In that application, the respondent sought, among others, primary residence of the parties' three minor children,

aged 10, 3 and 2 years old, respectively. The younger children are girls. At that stage, the two elder children's primary residence was with the respondent. Upon hearing the matter, the court (Msimeki J) made an order directing the Family Advocate to urgently investigate the best interests of the children with regard to their primary residence and contact. Pending that investigation and report, the status quo in respect of the minor children remained.

[2] On 7 September 2012 the Family Advocate released an interim report, in which it is recommended that the applicant be referred for pathological tests regarding allegations of alcohol abuse, and for both parties to chose one psychologist to conduct psychological, emotional and behavioural assessment of the minor children and of the parties, as well as their parenting skills and capabilities.

[3] On 25 March 2013 the elder children visited the applicant in Mthatha, Eastern Cape, for the school holidays. The children were supposed to return to Gauteng when schools re-opened on 9 April 2013. The applicant did not return the children, claiming that both of them had expressed their reluctance to return to Gauteng. As a result, on 10 April 2013 the applicant launched an urgent application, set down for 12 April 2013 at 11h00. In the application, she prayed for the issuance of a rule nisi calling upon respondent to show cause on 18 April 2013 at 10h00 why an order varying the order of 22 June 2012, placing the primary residence of the elder children with the applicant, should not be made 'final' pending the finalization of the rule 43 application referred to above.

[4] The respondent served an answering affidavit on 12 April 2013. On the same day, the applicant removed the matter from the urgent roll of 12 April 2013, and simultaneously enrolled the application on the urgent roll of 16 April 2013. The matter was however, not

placed on the roll, as apparently, the registrar of Prinsloo J, who was in the urgent court during that week, declined to accept the papers.

[5] On 19 April 2013, the respondent, accompanied by members of the South African Police Service (SAPS) showed up at the applicant's residence in Mthata and demanded that the two children be returned to his care, as per the order of 22 June 2012. Eventually, the elder boy left with the respondent, but for reasons which are controversial, his little sister remained in Mthata with the applicant.

[6] On 8 May 2013 the respondent brought a contempt application against the applicant for failing to release the girl to his primary residence as per the order of 22 June 2013. The court (Maumela J) issued an order that the girl be returned to the primary care of the applicant as per the court order of 22 June 2013. The contempt application was postponed sine die, and the applicant was granted leave to file her answering affidavit in the contempt application, within 20 days of the order.

[7] On 13 May 2013 the applicant launched, on an urgent basis, an application in terms of rule 43(6) seeking to vary the court order of 22 June 2013 in such a manner as to award primary residence of the two elder children to the applicant, pending the finalization of the pending rule 43 application. The application was set down on the urgent roll of 14 May 2013.This is how the application came before me. The practice directive of this court provides that if an application is not filed (bound, indexed and paginated) by 12h00 on the previous Thursday (subject to to the degrees of ascending urgency), the application will not be heard and it will be struck off the roll. The founding affidavit, though paginated, is not indexed. The answering and replying affidavits are both neither paginated nor indexed. The papers are not bound. The court file is in an unorganised, disgraceful and confusing

state. When I received the file, it was very difficult to follow what was being sought. The applicant's founding affidavit in the application launched on 10 April 2013, was not on the court file, and was only handed up in court during argument.

[8] Ms. Ensiin, counsel for the respondent argued that the relief sought by the applicant is incompetent, as, so was the argument, there was no order in terms of rule 43. As such, so counsel contended, there can not be a variation of a non-existing order. Counsels submission in this regard is premised on the fact that the rule 43 application had been postponed sine die, and no order was made. I disagree. The order awarding the interim primary residence of the two elder children to the respondent, is an 'order' capable of being varied in terms of rule 43(6).

[9] However, that is not the end of matter. Urgency remains heavily disputed. I turn now to consider that aspect. Mr. Makhambeni, counsel for the applicant, urged me to disregard the clearly non-compliance with the directive of this court concerning urgent applications. Counsel submitted that I am entitled to do so under the rubric 'in the interest of the minor child'. It is correct that the practice directive remains only that - a directive, and in suitable circumstances, a Judge, exercising a discretion, may depart from the directive.

[10] In the matter before me, as outlined above, the matter has been on the urgent roll on 12 April 2013, where it was removed, as clearly, the matter could not be heard as the respondent had only filed his answering affidavit that morning. But this should have been foreseen by the applicant. Given the acrimonious history between the parties, it was more than likely that the application would be opposed, and that the application was unlikely to be heard that day. In this regard, para 8 of the practice directive provides:
'In accordance with the Republikeinse Publikasies judgement an applicant may choose to

set the matter down on any Tuesday (or other day, in accordance with the degrees of urgency referred to in Luna Meubel Vervaardigers), but is the applicant does not wish to have the matter heard on that day at the time indicated it is wrongly enrolled and the procedure abused. If an applicant anticipates that the application will be opposed it is essential that the respondent and the applicant be allowed reasonable times for the filing of answering and replying affidavits before the roll closes at 12:00 on Thursday. If these affidavits cannot be filed in time and the matter cannot be heard at the time indicated in the notice of motion the procedure is abused'.

[11] Then there was a failed attempt to place the matter on the roll on 16 April 2013. Even at that stage, the matter was not ripe for hearing as the applicant had not yet filed her replying affidavit, which was only deposed to on 18 April 2013, and filed only on 3 May 2013. Therefore, even if the matter was enrolled for 16 May 2013, the likelihood is that it would not have proceeded, for the reason that the full set of papers were not before court.

[12] There is no credible evidence that the lives of the two elder children are in any manner, in imminent danger while in the primary residence of the respondent. Children, especially of that young age, are impressionable, and may express unhappiness about this or that factor while in the care of a parent. But that is no basis to suggest imminent danger to them. I therefore come to the conclusion that the applicant is abusing the process of this court. Apart from abuse of the process of this court, the applicant has demonstrated total and flagrant disregard for the most basic requirements of the practice of this court regarding pagination and indexing, which I have set out in detail in paragraph [6] above.

[13] The application has to be struck from the roll. I have to consider the question of costs in light of my finding that the applicant disregards, and abuses the process of this court. In

disputes relating to children where the parties are acting in the interests of the children there is no winner or loser and accordingly in the normal course each party should pay its own costs (Mcall v Mcafl 1994 (3) SA 201 (C) at 209B-C; KG V CB 2012 (4) SA 136 (SCA) 160H-I).

[14] In the present case, I am satisfied that the applicant's conduct is far remotely connected to the interests of the minor children. She seeks an order uprooting the elder children from their familiar environment, on the flimsiest of excuses. She caused the elder boy to miss about two weeks of school. I cannot see how that can be in the interests of the child. She must be ordered to pay the costs.

[15] In the result the application is struck off the roll with costs.

TM MAKGOKA

JUDGE OF THE HIGH COURT

DATE OF HEARING : 14 MAY 2013

JUDGMENT DELIVERED : 15 MAY 2013

FOR THE APPLICANT : ADV P W MAKHAMBENI

INSTRUCTED BY : SANDILE MAJAVU INC, PRETORIA

FOR THE RESPONDENT : ADV ENSLIN

INSTRUCTED BY : NGENO & MTETO ATTORNEYS, PRETORIA